BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JACQUELINE K. SIMPSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,034,864
UNITED PARCEL SERVICE	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the August 14, 2007 preliminary hearing Order of Administrative Law Judge Bruce E. Moore. Claimant was granted medical care under surgeon B. Theo Mellion, M.D., after the Administrative Law Judge (ALJ) determined claimant had suffered accidental injuries arising out of and in the course of her employment with respondent, and had provided timely notice of those accidents.

Claimant appeared by her attorney, John M. Ostrowski of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Robert J. Wonnell of Kansas City, Kansas.

The Appeals Board (Board) adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the Deposition of Jacqueline K. Simpson taken on July 11, 2007; the transcript of Preliminary Hearing held August 1, 2007, with attached exhibits; the Deposition of Robert Modrell taken August 1, 2007; the Deposition of Charles Wurz taken August 1, 2007, with attached exhibits; the Deposition of Michael White taken August 3, 2007, with attached exhibit; and the documents filed of record in this matter.

ISSUES

1. Did claimant meet with personal injury by accident?

2. If so, did claimant's accidental injuries arise out of and in the course of her employment with respondent?

3. Did claimant provide respondent with timely notice of those accidents?

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant, a long-term employee of respondent, had worked as a truck driver for the last seven years. Her job required that she transport semi-trailer trucks from Salina, Kansas, to Lenexa, Kansas, daily. This did not require that she load and unload the trailers, only that she haul them between the cities, and raise and lower the trailers when they were hooked or unhooked from the tractor. Claimant usually worked approximately 9 hours per day.

In March or April 2007, claimant began noticing increased pain in her low back while driving. This was not the first time claimant had experienced back problems. Claimant had been receiving chiropractic treatments for her low back since she was 17 years old. At the time of the preliminary hearing, claimant was 39 years old. Thus, these periodic chiropractic treatments had been ongoing for 21 years. However, claimant testified that the pain increased in March or April, with pain radiating into her right hip and buttock and down her right leg. Claimant also acknowledged that she spends a considerable amount of time riding motorcycles. This activity does, at times, contribute to her back pain.

The tractor claimant drove was equipped with an air-ride cushion system with multiple adjustments for lumbar support. In a telephone interview given on May 17, 2007, to Jennifer Ostergreen of Gallagher Bassett Services, claimant acknowledged that her pain was just from normal wear and tear on her back. Claimant agreed she was not required to do any pushing or pulling with her job. But she also noted her problem was just from being in a "semi for 9 hours a day."[1]

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[1] P.H. Trans., Resp. Ex. C at 4.

Claimant alleges that she told several of respondent's employees of her ongoing back problems. Robert Modrell, a mechanic for respondent, denied that claimant ever told him her seat was causing her pain. He did admit that claimant told him the seat was uncomfortable, or that it was "sitting off to the side".[2]

Michael White, respondent's on-road supervisor over the feeder department, denied that claimant ever told him of any ongoing back pain associated with her job. He acknowledged that complaints about seat adjustments would go to the mechanics, rather than to him. However, any physical pain complaints would come to him, and he would log the complaint, even if no medical treatment was needed or requested.[3] However, complaints during casual conversations would be less likely to be logged because drivers have a tendency to complain.

Charles Wurz, respondent's extended feeder manager and claimant's supervisor, testified that claimant told him of her back problems, but that she initially stated they were not work related. However, by May 14 or 15, 2007, claimant came to him and stated the problems with her back were from her job with respondent.[4] When claimant was asked why the change in story, she said her doctor had told her that her problems were work related. The last day that claimant worked for respondent was May 2, 2007. Not counting weekends and holidays, the tenth day after May 2, 2007, would be May 16, 2007.

Claimant initially sought treatment from Byron Tomlins, D.C., for chiropractic adjustments. However, after looking at x-rays of claimant's back, Dr. Tomlins referred her to family practitioner Dennis C. Woodall, M.D. Dr. Woodall ordered an MRI of claimant's lumbar spine. The MRI, taken on May 8, 2007, displayed L5-S1 disk desiccation, with a prominent right paracentral disk protrusion and possible annular tear at L5-S1, with probable displacement of a descending right nerve root.

Claimant was then referred by Dr. Woodall's office to the Abay Neuroscience Center where she came under the care of Dr. Mellion. On June 6, 2007, claimant underwent a right L5-S1 hemilaminotomy, microdiscectomy and foraminotomy.

Dr. Woodall, in his letter of July 9, 2007, stated that claimant's back pain would have been worsened while she performed the continuous driving for respondent.

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[2] Modrell Depo. at 5.

[3] White Depo. at 17.

[4] Wurz Depo. at 10-11.

Claimant was referred by her attorney to pain management specialist George G. Fluter, M.D., for an examination on July 17, 2007. Dr. Fluter found claimant to be post surgery at L5-S1. He opined that, to a reasonable degree of medical probability, there is a causal/contributory relationship between claimant's current condition and her work-related activities with respondent.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[5]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[6]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[7]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[8]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify

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[5] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

[6] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[7] K.S.A. 2006 Supp. 44-501(a).

[8] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

a preexisting condition, the aggravation becomes compensable as a work-related accident.[9]

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate a preexisting condition. This can also be compensable.[10]

It is not in dispute that claimant had preexisting back problems for which she sought chiropractic treatments for years. However, this record supports the finding by the ALJ that claimant's condition was aggravated by her job duties with respondent. The opinions of Dr. Woodall and Dr. Fluter confirm that claimant's driving duties aggravated her ongoing back problems. Therefore, the determination by the ALJ that claimant has proven that she suffered accidental injuries arising out of and in the course of her employment with respondent is affirmed.

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.[11]

In calculating the 10 days in K.S.A. 44-520, Saturdays, Sundays and legal holidays are excluded.[12]

The testimony of Charles Wurz, claimant's supervisor, confirms that claimant told him of the work-related nature of her claim on either May 14 or 15. Ten days after May 2 (claimant's last day of work with respondent before her surgery) is May 16. Thus, notice to Mr. Wurz would be timely, pursuant to K.S.A. 44-520.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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[9] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[10] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

[11] K.S.A. 44-520.

[12] *McIntyre v. A. L. Abercrombie, Inc.*, 23 Kan. App. 2d 204, 929 P.2d 1386 (1996).

[13] K.S.A. 44-534a.

CONCLUSIONS

The evidence supports the determination by the ALJ that claimant suffered accidental injuries arising out of and in the course of her employment with respondent while driving a truck. Additionally, claimant provided timely notice to Mr. Wurz of her work-related injuries. Therefore, the Order of the ALJ granting claimant medical treatment with Dr. Mellion as the designated authorized treating physician should be affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Bruce E. Moore dated August 14, 2007, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November, 2007.

BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant
Robert J. Wonnell, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge